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# Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARVIN M. KARPATKIN
RHODA H. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021
*Attorneys for Petitioner*

MELVIN L. WULF
ALAN H. LEVINE
156 Fifth Avenue
New York, N. Y. 10010
*Of Counsel*

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# Supreme Court of the United States

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DAVID ARTHUR GEAREY,

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—v.—

UNITED STATES OF AMERICA,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 3, 1967, and the prior judgment of such Court in the same case entered on October 21, 1966.

### Citations to Opinions Below

There are two opinions by the Court of Appeals, and two opinions by the United States District Court for the Southern District of New York, both by Hon. Thomas F. Murphy, Jr., United States District Judge. Judge Murphy's first opinion, finding the petitioner guilty, is printed in the Appendix, *infra,* p. 39*, and is reported at 260 F. Supp. 7 (1966). The Court of Appeals' first opinion, which

* References to material printed in the Appendix will appear as "Appendix, *infra,* p. ——."

vacated the conviction and remanded, is printed in the Appendix, *infra,* p. 23, and is reported at 368 F. 2d 144 (1966). Judge Murphy's second opinion, which reinstated the conviction, is printed in the Appendix, *infra,* p. 17, and is reported at 266 F. Supp. 161 (1967). The Court of Appeals' second opinion, affirming such conviction, is printed in the Appendix, *infra,* p. 1, and is unreported.

## Jurisdiction

The judgment of the United States Court of Appeals was entered on July 3, 1967. On August 4, 1967, Mr. Justice Fortas issued an order extending the time in which to file this petition for a writ of certiorari up to and including September 1, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

## Questions Presented for Review

1. Whether a conscientious objector claimant whose views do not mature until after an order to report for induction can be denied statutory rights available to all other conscientious objector claimants.

2. Whether the presentation to a local Selective Service board of a non-frivolous claim for reopening and consideration of a new Selective Service classification requires the local board to reopen such classification.

3. Whether the narrow standard of judicial review generally applicable to Selective Service classifications is posited on the availability of elaborate administrative re-

view, and consequently should not be applicable in a case where petitioner received no administrative review.

4. Whether petitioner's Selective Service local board's denial of his application for classification as a conscientious objector, submitted after he received an order to report for induction, is without any rational basis in fact

(a) because it is clear from the record that the denial was based solely or exclusively on (i) its lateness; and/or (ii) petitioner's stated readiness to use force in defense of his loved ones; or

(b) because the local board's legally erroneous belief that petitioner was not entitled to conscientious objector classification on grounds of his readiness to use force in defense of his loved ones, so contaminated the record, that the conviction cannot stand even if there are otherwise sufficient grounds for approving the denial of the claim.

5. Whether petitioner was denied procedural due process at the remanded hearing ordered by the Court of Appeals because

(a) he was denied the right to testify in his own behalf and to present documentary evidence; and

(b) the Government's entire case consisted of answers elicited from Local Board members to a series of prejudicial leading, conclusory questions.

## Constitutional, Statutory and Regulatory Provisions Involved

This case involves the due process clause of the Fifth Amendment and the religious liberty clause of the First Amendment.

The statute involved is Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 U. S. C. App. §456(j), which, at all times pertinent* to this case, read as follows:

> "(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of

* The Military Selective Service Act of 1967, effective July 1, 1967, made certain amendments to Section 6(j) not relevant to this case.

such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who

knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

A number of Selective Service Regulations which were in effect at all times pertinent to this case are also involved. They are 32 CFR §1625.2, 32 CFR §1625.4, 32 CFR §1625.11, 32 CFR §1625.12, 32 CFR §1625.13, 32 CFR §1625.14, and 32 CFR §1626.25,[1] all of which are printed in the Appendix, *infra*, pp. 53-58.

## Statement of the Case

Petitioner refused to submit to induction into the Armed Forces in New York, New York on July 8, 1965. His defense is that he was and is a conscientious objector, as de-

[1] Rescinded by E. O. 11360, June 30, 1967. The other regulations are still in effect.

fined in the statute, and that his Local Selective Service Board had improperly and unlawfully refused to so classify him. He was indicted, tried without a jury, found guilty, and sentenced to two years' imprisonment, in the United States District Court for the Southern District of New York. 260 F. Supp. 7; App., *infra*, p. 21.

The unique factor in this case, which led to its being heard twice in the District Court and in the Court of Appeals,[2] is that petitioner claimed that his conscientious objector views did not mature until after he received an order to report for induction.[3] Under the Universal Military Training and Service Act of 1950, then in effect,[4] all

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[2] References to the trial minutes will be "Tr. ___a" referring to Appellant's Appendix in the Court of Appeals in the first appeal. References to the minutes of the hearing ordered by the Court of Appeals will be "H. ___" referring to Appellant's Appendix in the Court of Appeals in the second appeal. Certified copies of both Appendices are being filed in lieu of transcripts of the record, pursuant to Rule 21 (3).

[3] While his order to report for induction was pending, but the date of reporting postponed, he asked for, filled out and submitted a Special Form for Conscientious Objectors, SSS Form No. 150. After the Board had received his form, on June 17, 1965, he was simultaneously mailed two communications, one directing him to report for induction on July 8, 1965, and the other requesting him to appear before the Board on July 6, 1965. 368 F. 2d at 147, App., *infra*, p. 42. On July 6, 1965, he was orally informed that his claim was denied and that the induction order should be complied with. No written communication was sent to him advising that reopening was denied, as required by 32 CFR §1625.4; App., *infra*, p. 54. The District Court, while acknowledging non-compliance (260 F. Supp. at 13, App., *infra*, pp. 48-50), held that the requirement of written notice was fulfilled by oral notice. The Court of Appeals did not comment on this point, although duly raised.

[4] The Act expired on June 30, 1967. The Military Selective Service Act of 1967 went into effect on July 1, 1967. Although section 6(j) of the new Act does not provide any of the *special* appellate rights for conscientious objectors, it retains the right to an administrative appeal available to all registrants seeking a change in classification.

conscientious objector claimants were entitled to special appellate rights—including Department of Justice investigation, hearing before a special hearing officer, and advisory recommendation—in addition to an appeal to the Selective Service State Appeal Board. 50 App. U. S. C. §456(j). But various Selective Service regulations, and the action of petitioner's Local Board thereunder, sought to deny *all* of these appellate rights to petitioner or to any Selective Service registrant who did not assert his claim prior to the mailing of an order to report for induction. 32 CFR §§1625.2-1625.4; App., *infra*, p. 53.

The District Court and the Court of Appeals both approved of this denial of due process rights otherwise available. However, the Court of Appeals, in its first decision in this case, (*Gearey I*), found sufficient ambiguity in the minutes of the Local Board's action[5] to allow for the possibility that Gearey's claim might have been rejected by his Local Board *solely* because of its lateness. This, the Court held, would require reversal, if Gearey's views had not matured until after the order to report, since

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[5] The minutes of Gearey's encounter on the evening of July 8 read:

"Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. #150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would definitely be working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0."

368 F. 2d at 147, fn. 4; App., *infra*, p. 3.

> "It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his notice, although the belatedness of a claim may be a factor in assessing its lateness. . . . The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments."

368 F. 2d at 149-150; App., *infra*, pp. 31-32.

Consequently, the Court of Appeals vacated the conviction and remanded "to enable the judge to ascertain from the Local Board precisely what it meant". (*Id.* at 151; App., *infra*, p. 34.

The District Court and the Court of Appeals likewise did not accept petitioner's further arguments (1) that he was entitled to a reopening of his case—and attendant appellate rights—upon the presentation of a non-frivolous claim for a new classification, even after an order to report; and (2) that he should not be held to the narrow standard of judicial review customary in Selective Service cases, precisely because it is posited on the existence of elaborate administrative review, which he was explicitly denied.[6]

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[6] Accordingly, the trial court refused to hear testimony as to the formulation or content of his conscientious objector beliefs, the reason for their slow maturation, and the fact that he asserted his beliefs with dispatch as soon as they were matured. Tr. 61a-70a. Such rejected offer of proof would have included, in addition to petitioner's testimony, the testimony of Brother Isadore, O. S. F. (Robert McCarron), Chairman of the Theology Department at St. Francis College, who was Gearey's professor and advisor, and who had spent many hours counseling with him on a regular basis dur-

At the remanded hearing, the District Court received the testimony of three members of the Local Board, found that the Board had not denied petitioner's claim for any improper reason, reinstated the conviction, and reimposed the two year sentence. The Court of Appeals affirmed. (*Gearey II*).

A number of occurrences at the remanded hearing provide the basis for petitioner's further contentions that the denial of his claim was without any rational basis in fact. To begin with, although the District Court found otherwise, the record amply demonstrates that the lateness of the claim was a predominating reason for its denial.[7]

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ing the period that his views were crystallizing. However, Bro. Isadore and Msgr. Robert J. Fox, Director of an anti-poverty project of the New York Archdiocese were allowed to testify as character witnesses. Tr. 71a-77a. Gearey was allowed to testify as to his Catholic religious upbringing and parochial schooling, attendance at a college run by the Franciscan Order, and employment as a teacher at a diocesan high school, Tr. 51a-58a, but he was cut off before he could explain his difficulties in coping with the questions on the Special Form for Conscientious Objectors, SSS Form No. 150, Tr. 59a. Of particular significance in explaining the slow maturation of his views would be a description of his difficulties in answering yes or no to the Supreme Being question, and the question of whether he belonged to any religious group, Tr. 98a-102a, 94a.

[7] E.g., Board Chairman Barbiere testified:

"Q. Was there any discussion as to whether this happened before or after the order to report for induction? A. It seems to us it happened after reporting for induction.

"Q. After he received the order? A. Yes, that is right.

"Q. Did that have anything to do with decision to denying his application? A. It had with me" (H. 132). See also H. 96.

Board member Elmezzi testified:

"A. Well, we would—he was already inducted—sent for induction and we—that we would review the case. Maybe something else was new; I don't know. But since he had in the past never brought up a reason like this, we couldn't see where it would

Moreover, it appeared that the only substantive questions asked of petitioner by the Local Board members on July 6, 1965, concerned his willingness to use force in defense of loved ones. Two of the three Board members testified that petitioner's statement that he would, if necessary, seek to ward off an attack on his loved ones, disqualified him from conscientious objector classification.[8] The third Board member acknowledged that the answer was satisfactory. H. 40, 44. But none of the Board members could recall any unsatisfactory answers to any other questions pertaining to religious training or belief, or any other aspect of conscientious objection.[9] There was indeed testimony that Board members regarded petitioner as "insincere", but there is strong evidence that the feeling of insincerity was based largely, if not exclusively, on the lateness of the claim.[10]

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be a conscientious objector case" (H. 151-152). See also H. 167, H. 174, H. 175.

Board member Hatterschied referred to petitioner's statement that his claim had been asserted only recently as an "admission", implying that it was an incriminating remark (H. 35). See also H. 37.

[8] E.g., testimony of Mr. Barbiere:

"Q. And you regarded an answer that he would try to ward off the attack as being unsatisfactory? A. That is right" (H. 122). See also H. 123, 124.

Mr. Elmezzi testified:

"Q. So that anyone who would use force to defend his family is not making a satisfactory answer to this question? Is that what you are saying? A. Yes" (H. 166). See also H. 161.

[9] Cf. Hatterschied, H. 44; Barbiere, H. 121, 134; Elmezzi, H. 178.

[10] Thus Mr. Elmezzi testified that Gearey was "evasive". On cross-examination he testified: "Well, the evasiveness was, it never came up. All this problem never came up until this time" (H. 167). See also Barbiere testimony: "My feeling was he just came in that evening and decided that he was a c.o. for the first time" (H. 96).

Petitioner attempted to testify in his own behalf at the hearing, but he was not permitted to do so, H. 194-196, nor was he permitted to introduce into evidence a memorandum of his version of the events which occurred at the Local Board on July 6, 1965, H. 196-199. Timely objections were recorded to both rulings. Petitioner also objected to the District Court's allowing the Government to present its entire case via a series of conclusory, leading questions,[11] all of which were designed to produce yes or no answers sufficient to meet the direction of the Court of Appeals in *Gearey I*. All of petitioner's objections were overruled, and the District Court's rulings were affirmed by the Court of Appeals.[12]

## Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of Federal law which have not been but should be settled by this Court; because some of its holdings conflict with decisions of other Courts

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[11] E.g., the questions asked of Mr. Hatterschied:

"Q. In this interview on July 6, 1965, was the board committed to not reopening Mr. Gearey's classification on the ground that Mr. Gearey had not advanced the claim until after having received his induction notice?" (H. 9)

* * * * *

"Q. Was the board prepared in this interview on July 6, 1965 to give Mr. Gearey an opportunity to advance his position and request for reclassification as a conscientious objector without regard to the fact that he had been issued an induction order?" (H. 10)

See also Barbiere at H. 87-89, and Elmezzi at H. 153-156. In two instances, the prosecutor's complicated leading questions resulted in the witnesses' missing their signals and giving unexpected answers. See Barbiere at H. 88, and Elmezzi at H. 154.

[12] The Court of Appeals did not rule on the leading questions argument.

of Appeals, and appear to conflict with applicable decisions of this Court; and because its decision has so far sanctioned the departure of the District Court from accepted and usual standards of judicial proceedings as to call for an exercise of this Court's power of supervision.

## I

There is a direct conflict between the statute, 50 App. U. S. C. §456(j), which granted appellate rights, both regular and special, to *all* conscientious objector claimants, and the regulation which sought to deny these rights in the case of claims asserted after an order to report for induction. 32 CFR §1625.2; App., *infra*, p. 53. The Court of Appeals held for the regulation because:

> " . . . it is essential and proper for an administrative agency . . . to require that claims be raised within reasonable time limits or be forfeited."

368 F. 2d at 149; App., *infra*, p. 31.[13]

The case was one of first impression in the Second Circuit, the Court indicating that it agreed with similar decisions in other circuits.[14] *Ibid.*, footnote 9. But the opinion does not reveal that the law in the Third Circuit is

[13] The Court of Appeals' brief discussion of this point is exclusively in *Gearey I*. In *Gearey II*, it stated that it declined to reconsider any of the arguments directed to this point, App., *infra*, p. 14, fn. 11, although some of them were raised for the first time, in the context of the record of the remanded hearing.

[14] Although the Court of Appeals also listed a Seventh Circuit decision, *United States* v. *Schoebel*, 201 F. 2d 31 (1953), it did not comment on *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, 635 (7th Cir. 1945) which affirmed the right to a statutorily-entitled deferment at any time prior to actual induction, notwithstanding any contrary regulation.

sharply to the contrary. Courts in the Third Circuit have held consistently that where the registrant comes within the provisions of the conscientious objector statute, or any other statutory deferment, any contrary procedural regulation is invalid. *United States* v. *Underwood,* 151 F. Supp. 874, 876 (E. D. Pa. 1955); *Sorenson* v. *Selective Service System,* 203 F. Supp. 786, 792 (E. D. Pa. 1962); *United States* v. *Brown,* 129 F. Supp. 237, 238 (D. N. J. 1955); *United States* v. *Clark,* 105 F. Supp. 613, 615 (W. D. Pa. 1952); cf. *United States ex rel. Berman* v. *Craig,* 207 F. 2d 888, 891 (3d Cir. 1953); *United States* v. *Zasadni,* 206 F. Supp. 318, 321, n. 3 (W. D. Pa. 1962); *United States* v. *Vick,* unreported (E. D. Pa. Cr. #2292, Sept. 22, 1965).[15]

As District Judge Ganey (now Third Circuit Judge) held in *Underwood*:

> "It is plain that a person meeting the conditions of the above section of the Act is not to be subjected to combatant training and service. This privilege is not to be defeated by procedural regulations. Nowhere in the Act does it provide that unless the registrant makes his claim before the notice of induction he thereafter waives his right to the privilege. Had Congress so intended, it would have set forth such intention in unmistakable terms."

151 F. Supp. at 876.

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[15] *Accord: United States* v. *Sobczak,* 264 F. Supp. 752, 756 (N. D. Ga. 1966); *United States* v. *Crawford,* 119 F. Supp. 729 (N. D. Cal. 1954) (Selective Service regulations may not "circumvent the clear language of the statute", even where conscientious objector claim not asserted until nine months after order to report).

The argument in the *Underwood* decision, as well as the other cases cited both within and without the Third Circuit is supported by the scholarly writing on this subject. " . . . [T]he right to claim an exemption was intended to be available up to the moment of induction . . . ," Clancy and Weiss, "The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations", 17 Maine L. Rev. 143, 146 (1965). *Accord*: "Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption", 72 Yale L. J. 1459, 1465 (1963).

This Court should resolve the conflict between the circuits[16] by holding that a Selective Service regulation which is "out of harmony with the statute is a mere nullity". *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, 134 (1936).[17]

The Court of Appeals held in *Gearey I* that there is a substantive right to claim conscientious objector status for a young man whose views do not mature until after the receipt of an order to report for induction. This means that no obloquy or discrimination may be suffered by one who asserts a post-order to report claim, so long as both

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[16] Further conflict between the circuits is imminent inasmuch as the Ninth Circuit has recently intimated that it disagreed with *Gearey I*. *Parrott* v. *United States*, 370 F. 2d 388, 395 (1966).

[17] In *United States* v. *Nugent*, 346 U. S. 1 (1953), this Court held that the special procedural rights for conscientious objector claimants must "be made available whenever a registrant insists that his conscientious objector claim has been misjudged by his local board." *Id.* at 8-9. The Ninth Circuit read this language to mean that in the event of "a clear conflict between the regulation and the statute", the statute must prevail. *De Moss* v. *United States*, 218 F. 2d 119 (9th Cir. 1954), rev'd on conf. of error, 349 U. S. 918 (1955).

the assertion of the claim, and the crystallization of the views upon which it is based, both followed the order to report. See 368 F. 2d at 149-150; App., *infra*, pp. 31-32. This was an important holding because decisions in other Circuits had apparently adopted the view of the Selective Service System[18] that the regulation in question, 32 CFR §1625.2, validly barred all post-order to report claims. See *United States* v. *Taylor*, 351 F. 2d 228 (6th Cir. 1965); *Boyd* v. *United States*, 269 F. 2d 607 (9th Cir. 1959); *United States* v. *Schoebel*, 201 F. 2d 31 (7th Cir. 1953).

But the Court below gave with one hand and took back with the other. After articulating this humanitarian principle, it invested in the Local Board complete, unappealable, and virtually judicially unreviewable[19] discretion to determine if the late claimant falls within the favored category.[20] By depriving late claimants of all appellate rights, no allowance is made for the possibility that the Local Board might err in making the very delicate chronological and substantive determinations, which it is required to

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[18] See Hershey, *Legal Aspects of Selective Service* 32, and cases cited in fn. 93 (1963). Such was the view taken by the General Counsel of the Selective Service System in his letter to the New York City Director forwarding this case for prosecution. Letter of Aug. 17, 1965, included in Govt's Exhibit 2 in Court of Appeals Record of *Gearey I*.

[19] Because of the limited judicial review which it held applicable to this type of Local Board decision. See *infra*, pp. 22-24.

[20] All that *Gearey I* requires is that the late application be "considered by the Local Board." 368 F. 2d at 150; App., *infra*, p. 32. There is not even a requirement that the claimant receive a hearing, or even an "interview".

make under the rule[21] laid down by the Court of Appeals.[22] Unless a Gearey-type late claimant is held entitled to the same or equivalent appellate rights as a pre-order claimant, the noble principle enunciated will surely be frustrated in many cases,[23] as indeed petitioner urges that it was frustrated here.

The only justification presented for this arbitrary cut-off of statutory rights is not a legal one, but a policy consideration. The Court below fears that chaos would result and the meeting of manpower quotas would be affected because of a flood of late claims. 368 F. 2d at 149; App., *infra*, p. 30. The Court offered no documentation to support this fear. Petitioner submits that this speculative policy justification is unpersuasive for a number of reasons. First, the total number of men seeking conscientious objec-

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[21] "[T]he Local Board must first determine when an applicant's beliefs matured. If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened. If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify . . . he would be entitled to be reclassified by the Local Board." 368 F. 2d at 150; App., *infra*, pp. 32-33.

[22] The purpose of any appeal is to guard against the possibility of error. Certainly that possibility is no less present where the Local Board is instructed that "the belatedness of a claim may be a factor in assessing its genuineness." 368 F. 2d at 149-150; App., *infra*, p. 32.

[23] That injustices will be inevitable under these circumstances is demonstrated by the Report of the National Advisory Commission on Selective Service (the Marshall Commission) (1967):

> "There is a disparity between the attitudes of local boards concerning the 1-O (C.O.) classification. This area may be characterized by particularly strong differences of opinion between the registrant and the local board; for example in one state over half of the local board members (55%) think conscientious objectors should not be deferred at all." (*Id.* at 108-109.)

tor status continues to be very small.[24] Second, a deliberate bad faith applicant, a draft dodger who presents a sham or frivolous claim, will be more likely to present it well within the time limits; it is the sincere but slow-crystallizing claimant who will be likely to be affected. Third, the problem of delay, if it should ever exist,[25] can be easily met by an expedited process of hearing and appeal for post-order to report claims. See 72 Yale L. J. at 1468.

The decision below thus creates a differentiation in treatment, based on the time of maturation of religious beliefs. There is more due process for early believers and less due process for late believers. Constitutional questions of infringement of religious liberty are raised, since this is scarcely different from a preference of "one religion over another", *Everson* v. *Board of Education,* 330 U. S. 1, 15-16 (1947). See *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Torcaso* v. *Watkins,* 367 U. S. 488 (1961). This Court should grant certiorari to either resolve this important constitutional question, or to so construe the statute and regulation as to make such resolution unnecessary. See *United States* v. *Seeger,* 380 U. S. 163 (1965).

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[24] See Report of National Advisory Commission on Selective Service, Table 5-4, pp. 136-143 (1966). See also Goodman, "They March to Different Drummers", New York Times Sunday Magazine, June 26, 1966, pp. 7, 43: "Today the percentage of conscientious objectors in the draft population is about the same as during World War II."

[25] The court was "especially" concerned about the delay incumbent in "a protracted process of Justice Department investigation and hearing". Since July 1, 1967, the special appellate procedures for conscientious objector claimants have been abolished. Military Selective Service Act of 1967, §6(j). Under the new Section 6(j), conscientious objector claimants are entitled to the same administrative appeal within the Selective Service System as is available for all other categories of claimants, and no more. Consequently, a great deal of this argument has been rendered non-existent.

## II

The Court of Appeals likewise rejected petitioner's argument that the presentation to a Local Board of a non-frivolous claim for any change in classification, conscientious objector or otherwise, requires reopening and classification anew.[26] Although this Court has never ruled on the question, many decisions of Courts of Appeals have held or suggested that a refusal to reopen under such circumstances is a denial of due process. *Townsend* v. *Zimmerman*, 237 F. 2d 376 (6th Cir. 1956), per Circuit Judge [now Mr. Justice] Stewart); *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (3d Cir. 1953); *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, 635 (7th Cir. 1945); cf. *United States* v. *Vincelli*, 215 F. 2d 210, 213 (2d Cir. 1954), pet. for rehrg. denied, 216 F. 2d 681 (2d Cir. 1954); *United States* v. *Packer*, 200 F. 2d 540 (2d Cir. 1952), reversed sub nom. *United States* v. *Nugent*, 346 U. S. 1 (1953); see also *United States* v. *Stepler*, 258 F. 2d 310 (3d Cir. 1958); *Olvera* v. *United States*, 223 F. 2d 880 (5th Cir. 1955); *United States* v. *Ransom*, 223 F. 2d 15 (7th Cir. 1955); *United States* v. *Henderson*, 223 F. 2d 421 (7th Cir. 1955); *United States* v. *Peebles*, 220 F. 2d 114 (7th Cir. 1955); *Brown* v. *United States*, 216 F. 2d 258 (9th Cir. 1954); *United States* v. *Burlich*, 257 F. Supp. 906 (S. D. N. Y. 1966).

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[26] Sections 1625.2 and 1625.4 of the Regulations; App., *infra*, pp. 53-54, give the Local Board discretion to determine whether or not to reopen. Reopening, even if the same classification is renewed, invests in the registrant all of the procedural rights available upon an initial classification. Sections 1625.11, 1625.12, 1625.13; App., *infra*, pp. 54-55, and requires cancellation of any outstanding induction order, Section 1625.14; App., *infra*, p. 55.

*United States* v. *Vincelli, supra,* is particularly significant, since the Second Circuit[27] held in 1954: (1) broadly that reopening was required "when the basis of an application is not clearly frivolous", and (2) specifically that the sending of a conscientious objector questionnaire was in itself a reopening.

The Court below in *Gearey I* totally neglected petitioner's broader argument, and acted as if the only claim made based on *Vincelli* was that the mere sending of the form constituted a reopening. 368 F. 2d at 151; App., *infra,* p. 35. The Court then construed the decision of this Court in *United States* v. *Nugent,* 346 U. S. 1 (1953), which reversed sub nom. *United States* v. *Packer,* 200 F. 2d 540 (2d Cir. 1952), as "inferentially" indicating its view that the sending of a conscientious objector questionnaire "is not, *ipso facto,* a reopening". 368 F. 2d at 152; App., *infra,* p. 35. There is not a single word, inferential or otherwise, in this Court's decision in *Nugent* which so holds.[28] The Court below supports this "inference" by construing dicta[29] in the split decision on rehearing in *Vincelli,* 216 F. 2d 681 (1954). Thus, the confusion is plain, and only a decision by this Court can clarify whether or not *Nugent's* reversal of *Packer* was likewise a reversal of *Vincelli.*

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[27] The panel consisted of Chase, Chief Judge, and Frank and Hincks, Circuit Judges.

[28] This Court's decision in *Nugent* was that a registrant is not entitled to a full copy of the FBI report. (It held in *Simmons* v. *United States,* 348 U. S. 397 (1955) that he is entitled to a fair resume thereof.)

[29] Clearly dicta, because all three judges joined in denying the Government's petition for rehearing on other grounds.

The Court below in *Gearey II*, did respond somewhat to petitioner's broader reopening argument based on *Vincelli*, App., *infra*, p. 14, footnote 11. It rejected the contention on two grounds. First, it said that there was a distinguishing element in the cases which follow *Vincelli* and support reopening, i.e., that they all involved consideration of "objective facts", which presumably is not the case in a conscientious objector claim. The Court erred in its reading since some of the cases did involve conscientious objector claims.[30] Moreover, even a cursory review of the questions which must be answered on the Special Form for Conscientious Objectors will demonstrate the large number of "objective facts" which are involved in such a claim. See Selective Service System Form No. 150.[31]

Secondly, it argues that in the cases cited, the request for reclassification preceded the order to report for induction. With respect, the Court erred again since in one of the cited cases, the non-frivolous request for reopening was after an order to report for induction.[32]

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[30] See *Olvera* v. *United States*, 223 F. 2d 880 (5th Cir. 1955); *United States* v. *Peebles*, 220 F. 2d 114 (7th Cir. 1955). Most of the other cases involved claims by Jehovah's Witnesses for ministerial exemptions, the determination of which requires subjective and objective judgments similar to those in conscientious objector cases.

[31] The Selective Service System takes the position that "objective facts may be determinative of a conscientious objector claim", adverse to the claim. Hershey, *Legal Aspects of Selective Service* 10 (1963).

[32] *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3d Cir. 1953). See also *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, 635 (7th Cir. 1945). In any event, if petitioner's argument in Point I is tenable, this limitation is null and void, at least for conscientious objector claimants. See pp. 13-18, *supra*.

Moreover, the Court has not even attempted to explain or distinguish the broader holding of *Vincelli* itself,[33] which was a "non-objective" conscientious objector claim.

In any event, if *Vincelli* is applicable, then petitioner's conviction cannot stand. Certiorari should be granted, not only to declare the full meaning of *Vincelli* and the related cases, but to clarify the entire troublesome and important question of rights to reopening of a Selective Service classification.

## III

The Court of Appeals held that the narrow standard of judicial review—any rational basis in fact—is applicable to petitioner's conscientious objector claim. Such limited review has been upheld by this Court only where the defendant was protected by the administrative review procedures of the Selective Service System. Analysis of this Court's decisions indicates that unless conscientious objector claimants receive the procedural rights that the statute grants them, the narrow basis of judicial review may be neither applicable nor constitutionally tolerable.[34]

In the leading decision, *Estep* v. *United States*, 327 U. S. 114 (1945), Mr. Justice Douglas' majority opinion noted the thorough administrative scrutiny of a claim before holding that the statute allowed limited judicial review of the Selective Service proceedings. 327 U. S. at 116. The concurring opinions further indicate the importance of

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[33] Even if its interpretation of the demise of the narrow holding of *Vincelli* is correct, it could not claim that anything in *Nugent*, or *Packer*, or *Vincelli* on rehearing, diminished the holding that the presentation of a non-frivolous claim requires reopening.

[34] This argument was made below but there is no indication that it was considered in either *Gearey I* or *Gearey II*.

administrative appellate remedies to the application of narrow judicial review. Mr. Justice Frankfurter, believing that the statute should be interpreted to bar judicial review, based this conclusion on the administrative remedies available to the claimant:

> "Congress deemed it imperative to secure a vast citizen army with utmost expedition. It did so with due regard for the individual interests by giving ample opportunities, within the elaborate system which it established for supervision of the decisions of the multitudinous draft boards on the selection of individuals for service."

327 U. S. at 137 (Frankfurter, J., concurring).[35]

This concern was also voiced by Mr. Justice Murphy:

> "Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights."

327 U. S. at 126-127 (Murphy, J., concurring).

Subsequent decisions of this Court have also linked limited judicial review with administrative procedural safeguards. Thus, in *Witmer* v. *United States*, 328 U. S. 375 (1955), this Court detailed the administrative remedies

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[35] "Congress has not given to the local board authority to decide when such statutory rights of appeal may be availed of, nor to make 'final' unwarranted action by a board whereby such appeal is frustrated. . . . Accordingly, if a registrant does not obey an ordered induction because the board has cut off the opportunity which the statutes give him to appeal to higher authority, his obligation of obedience has not yet matured." *Id.* at 144.

available to a registrant immediately prior to restating the absence of direct judicial review. 348 U. S. at 376-377. Both *Simmons* v. *United States*, 348 U. S. 397 (1955) and *Gonzales* v. *United States*, 348 U. S. 407 (1955) held for conscientious objector claimants who had not received their full procedural rights. The Court, in *Simmons*, termed the claimant's right to a fair hearing a "fundamental safeguard." 348 U. S. at 406.

The Court below held, in *Gearey II*, that limited judicial review is applicable. App., *infra*, p. 11. Yet it held, in *Gearey I*, that post-induction order conscientious objector applicants need only have their claims "considered" by the local board, 368 F. 2d at 150, App., *infra*, p. 5, with no specification of any procedural rights to assure that such consideration will be fair. Limited judicial review may allow administrators to err in finding facts, but it does not allow them to disregard their statutory mandate for assuring thorough scrutiny of a conscientious objector claim. See 4 Davis, *Administrative Law* §28.12 (1958). The reasons for giving equivalent appellate rights to Gearey-type late claimants are the same as for pre-order claimants. The possibility of error exists equally in either case.[36]

This Court should hold that since the limited standard of judicial review is linked to the availability of administrative review, there must be broader judicial review where administrative review is not available. Certiorari should in any event be granted to clarify and settle this important question of the extent of judicial review.

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[36] Indeed, the possibility of error is perhaps greater in the case of a late claimant, since the Board is directed that it may take the lateness into account. See footnote 22, *supra*, p. 17, and accompanying text.

## IV

It is fundamental that a denial of a conscientious objector classification must have a rational basis in fact to survive judicial review. As the Court of Appeals held in *Gearey I*, an order to report for induction, which follows such a denial, can only be held valid "provided the judge found a rational basis for it." 368 F. 2d at 150-151, App., *infra*, p. 6. *Gearey I* held, quite properly, that in the case of a claim which matured and was asserted post-order, its denial because of the belated assertion would be irrational. *Gearey II*, however, invokes the doctrine of limited judicial review, and thereby gives its imprimatur to precisely such an irrational classification. Petitioner respectfully urges that a reading by this Court of the entire record of *Gearey II*[37] will disclose that the Court below failed to adhere to its own rule.

Petitioner urges that a fair reading of the record of *Gearey II* will demonstrate the contaminating influence of another irrational consideration. At least two members of the Local Board plainly had the erroneous view that petitioner did not qualify since he stated his readiness to use force to ward off an attack on his loved ones.[38] Neither the third member, who disagreed with this erroneous view, nor either of the other two, could recall a single other question or answer concerning petitioner's qualifications.[39]

The Court below does not dispute petitioner's contention that a disqualification on such grounds would be erroneous,

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[37] Excerpts which illustrate the predominance of this irrational factor are at pp. 8-12, *supra*.

[38] See excerpts of this testimony at p. 11, *supra*.

[39] See p. 11, *supra*.

App., *infra,* p. 9. But the Court finds a distinction between the many cases which hold that belief in use of force under such circumstances is no proper disqualification,[40] and the instant case which affirms Local Board action where petitioner was disqualified for precisely this reason. The suggested distinction is that "in each of the cited cases the evidence was *uncontroverted* that the registrant was opposed to participation in war." App., *infra,* p. 10. With respect, even assuming the validity of this novel distinction, it is not supported by "each of the cited cases." [41]

The Court below, in any event, holds that the Local Board's strong feelings about Gearey's insincerity outweighs any erroneous legal views on which the Board simultaneously "*may* have relied on to some extent," [42] App., *infra,* p. 12. Petitioner contends that the Court of Appeals has thereby repudiated an important rule of law that

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[40] See, e.g., *Sicurella* v. *United States,* 348 U. S. 385 (1955); *Jessen* v. *United States,* 212 F. 2d 897, 899 (10th Cir. 1954); *United States* v. *Hartman,* 209 F. 2d 366 (2d Cir. 1954); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. 1953); *United States* v. *Parmiter,* 173 F. Supp. 677, 687-689 (S. D. N. Y. 1959); see Hershey, *Legal Aspects of Selective Service* 12 (1963).

[41] In *United States* v. *Hartman, supra,* what was uncontroverted was that appellant therein was a Jehovah's Witness. This is a far cry from an assumption of sincerity. And in *United States* v. *Parmiter, supra,* the Selective Service System, and presumably the prosecution, argued that the registrant's attitude was based on selfish reasons.

[42] The Court below italicizes *"may"*, presumably to suggest some doubt as to whether the Board relied on Gearey's unexceptionable answers. The record is clear that two of the three testifying members were unequivocal in their testimony that these answers disqualified petitioner from the conscientious objector classification which he sought. See pp. 10-11, *supra.*

this Court, and Courts of Appeals have consistently followed in Selective Service cases. Until *Gearey II*, the rule was absolute that where the record discloses two reasons for denying a claim, one lawful, and the other unlawful, fairness, if not due process, requires reversal lest injustice be done.[43] The *Gearey II* court has now stated its readiness to depart from that humane rule, by the utilization of some extraordinary process of divination which will reveal whether or not the Board "relied on" the proper or the improper ground, both of them concededly being in the record. This Court should grant certiorari to review whether or not such unprecedented[44] judicial mind-reading can be a sufficient basis to send a man to jail.

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[43] *Sicurella* v. *United States, supra; United States* v. *Jakobson*, 325 F. 2d 409, 416-417 (2d Cir. 1963); *United States* v. *Kretchet*, 284 F. 2d 561 (9th Cir. 1960); *United States* v. *Yppasila*, 219 F. 2d 465 (10th Cir. 1954); *United States* v. *Shepherd*, 217 F. 2d 942 (9th Cir. 1954); *United States* v. *Hagaman*, 213 F. 2d 86 (3d Cir. 1954).

[44] The Court below cites no prior cases to support the distinction.

## V

Certiorari should also be granted in the exercise of this Court's power of supervision because the decision of the Court of Appeals in *Gearey II* has sanctioned the departure of the District Court from accepted and usual standards of judicial practice. Such departure was manifested at the hearing in two respects: (1) refusing to allow petitioner to testify and to introduce documentary evidence; and (2) permitting the prosecution to "prove its case" via a series of conclusory, leading questions, all obviously designed to elicit the yes or no answers thought necessary to show a proper compliance with the standard laid down in *Gearey I* to sustain the conviction.

By forbidding petitioner from testifying in his own defense in a criminal proceeding, the Courts below violated his constitutional and statutory rights; U. S. Constitution, Fifth Amendment, Sixth Amendment; 18 U. S. C. §3481; *Poe* v. *United States,* 233 F. Supp. 173, 176 (D. C. 1964) aff'd 352 F. 2d 639 (D. C. Cir. 1965).[45]

The District Court barred petitioner from testifying at the hearing because it believed it was so directed by the Court of Appeals in *Gearey I,* 266 F. Supp. at 162, App., *infra,* p. 20. The Court of Appeals in *Gearey II* did not explicitly approve of the exclusion, but concluded that it did not in any event amount to reversible error, App., *infra,* p. 12, because it could not see "the relevance"

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[45] Petitioner's counsel have not found a single reported precedent for such a denial of a defendant's right to testify, and the Court cites none. There is nothing strange about a defendant testifying in a Selective Service case. See *Niznik* v. *United States,* 173 F. 2d 328 (6th Cir. 1949), 184 F. 2d 972 (6th Cir. 1950); *United States* v. *Parmiter,* 173 F. Supp. 677, 688, 689 (S. D. N. Y. 1959).

of petitioner's testimony.[46] This Court should grant certiorari and hold that a defendant's right to testify in a criminal proceeding is absolute and not to be balanced against a court's prediction (or retrospective appraisal) of whether or not it would be (or might have been) irrelevant.

Petitioner submits that the trial court also committed reversible error by allowing the prosecution's entire case to be presented by leading questions of such an obvious and conclusory nature[47] that the prosecutor might just as well have dispensed with the witnesses and testified

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[46] The *Gearey II* court held that the exclusion was proper because petitioner could not testify as to the state of mind of the Board members, and thereby clear up the ambiguous entry in the minutes. But it is clear from the colloquy quoted in footnote 9, App., *infra*, p. 11, that petitioner was prepared to testify to everything which the Board members said in his presence. There is hardly any more appropriate way of showing state of mind at a particular time, than via the words uttered at such time by the persons whose states of mind are the subject of the inquiry. The *Gearey II* court also sanctioned the action of the District Court in refusing to allow the introduction into evidence of petitioner's contemporaneous memorandum of what happened at the Local Board on July 6, App., *infra*, p. 12. The District Judge never saw the memorandum, believing that he was barred by the Court of Appeals' direction; 266 F. Supp. at 162, App., *infra*, p. 20. But the Court of Appeals read it, and construed it in a peculiarly triple negative fashion—that it "does not reveal that the Board had no basis upon which it could reasonably have concluded that appellant was not sincere". App., *infra*, p. 14. Petitioner submits that this is not the proper standard of judicial review of admissibility of evidence in Selective Service cases. The memorandum is at H. 9a, and this Court can read it, as the Court of Appeals could. But the Court which was directed to resolve the ambiguity did not read it, because it believed it was ordered not to do so.

[47] See footnote 11, *supra*, p. 12, and accompanying text. "Questions . . . which so suggest the *specific tenor of the reply as desired by counsel* that such a reply is likely to be given irrespective of an actual memory, are illegitimate." 3 *Wigmore on Evidence* §769 (3d Ed. 1940). *Accord: United States* v. *Durham*, 319 F. 2d 59 (4th Cir. 1963).

himself.[48] The extent to which leading questions may be permitted is within the discretion of the Court, 3 *Wigmore on Evidence,* §770 (3d Ed. 1940), but this must be a reasoned discretion, see *Linn* v. *United States,* 251 Fed. 476, 482 (2d Cir. 1918); and where there is a strong showing of prejudice a conviction based in part on improper leading questions must be reversed; *State* v. *Hazlett,* 105 N. W. 617 (N. D. 1905); *Coon* v. *People,* 99 Ill. 368, 39 Am. Rep. (1881); 3 Wharton *Criminal Evidence* §847 (12th Ed. 1955). The questions were clearly prejudicial, and the failure to sustain the objections, combined with the failure to allow defendant to testify, resulted in a hearing which was profoundly unfair, and in violation of due process.

Neither the District Court nor the Court of Appeals touched on this point in their respective post-hearing decisions. While ordinarily questions of admissibility of evidence and trial procedure are not the concern of this Court, where the departure from due process standards is so egregious, this Court should grant certiorari in the exercise of its supervisory powers over Federal Courts.

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[48] Indeed, in the Government's brief in *Gearey II,* the prosecution urged that no testimony would be necessary: "A simple confirming letter from the board . . . would have been sufficient" (p. 19).

## CONCLUSION

The introductory words of *Gearey I* illuminate the importance of this case at this time, 368 F. 2d at 146, App., *infra*, p. 24. Events subsequent have emphasized the importance of the issues raised, and have added additional questions, of equal importance in the fair administration of "our system of conscription." *Ibid.*

**The petition for a writ of certiorari should be granted.**

Respectfully submitted,

MARVIN M. KARPATKIN
RHODA H. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021
*Attorneys for Petitioner**

MELVIN L. WULF
ALAN H. LEVINE
156 Fifth Avenue
New York, N. Y. 10010
*Of Counsel*

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# APPENDIX